LEGISLATIVE PROPOSAL

LEGISLATIVE PROPOSAL AF07-xx
ACTION OFFICER: Mr. Walter H. Pupko, AFMCLO/JAF, (937)904-7121

SEC. ___. AVAILABILITY OF FUNDS RECOVERED PURSUANT TO THE FALSE CLAIMS ACT.

Section 1552 of Title 31, United States Code, is amended by adding after subsection (b) the following new subsection (c):

(c) Notwithstanding the above,

(1) funds collected pursuant to any action for a false claim brought under section 3730 of this title, or pursuant to a demand for payment for a false claim prior to the filing of an action under section 3730 of this title, whether recovered as a result of a judgment by a court of competent jurisdiction or in settlement of such action or demand for payment, and

(2) funds collected pursuant to any requirement for restitution ordered by any District Court of the United States based upon conviction of a criminal offense arising out of a contract with the United States

which are authorized to be credited to an appropriation account but are not received before closing of the account under subsection (a), shall remain available for obligation or expenditure until September 30th of the fiscal year following the year in which the funds are received by the United States.

FULL TEXT OF PROPOSED REVISED STATUTE

§ 1552. Procedure for appropriation accounts available for definite periods

(a) On September 30th of the 5th fiscal year after the period of availability for obligation of a fixed appropriation account ends, the account shall be closed and any remaining balance (whether obligated or unobligated) in the account shall be canceled and thereafter shall not be available for obligation or expenditure for any purpose.

(b) Collections authorized or required to be credited to an appropriation account, but not received before closing of the account under

subsection (a) or under section 1555 of this title shall be deposited in the Treasury as miscellaneous receipts.

(c) Notwithstanding the above,

(1) funds collected pursuant to any action for a false claim brought under section 3730 of this title, or pursuant to a demand for payment for a false claim prior to the filing of an action under section 3730 of this title, whether recovered as a result of a judgment by a court of competent jurisdiction or in settlement of such action or demand for payment, and

(2) funds collected pursuant to any requirement for restitution ordered by any District Court of the United States based upon conviction of a criminal offense arising out of a contract with the United States

which are authorized to be credited to an appropriation account but are not received before closing of the account under subsection (a), shall be credited to the account as if the account had not been closed and shall remain available for obligation or expenditure until September 30th of the fiscal year following the year in which the funds are received by the United States.

SECTIONAL ANALYSIS

Section 1552 of Title 31 requires that fixed appropriation accounts shall be closed on September 30th of the 5th fiscal year after the period of availability for obligation ends, and that the remaining balance in the account shall be cancelled and thereafter shall not be available for obligation or expenditure for any purpose. Section 1552 further provides that collections which otherwise may be credited to such closed accounts shall be deposited in the Treasury as miscellaneous receipts.

The new subsection will change this general rule with respect to funds received as a recovery for a false claim, whether recovered as part of civil action or as restitution ordered upon conviction of an offense, and will restore the recovered funds to the accounts which were depleted by the false claim.

The False Claims Act (31 U.S.C. 3729 *et. seq*.) permits the United States to recover treble damages plus penalties for false claims. The Act also permits a private individual (a relator) to bring an action in the name

of the United States. The Act encourages relators to bring such actions by permitting them to share in any recovery based on their actions.

Recoveries under the False Claims Act are considered refunds of monies erroneously disbursed, and may be credited to the account from which they were erroneously disbursed. *See*, Matter of: Federal Emergency Management Agency - Disposition of Monetary Award Under False Claims Act, B-230250, 69 Comp. Gen. 260; February 16, 1990. Only single damages plus investigative costs may be refunded to the agency, while multiple damages and civil penalties must be deposited in the Treasury as miscellaneous receipts. *See*, *Tennessee Valley Authority--False Claims Act Recoveries*, B-281064, February 14, 2000, 2000 CPD ¶ 41. However, current law provides that where the account from which the monies were erroneously disbursed has been closed, all recoveries must be deposited in the Treasury as miscellaneous receipts. As stated by the Government Accountability Office:

> A repayment is credited to the appropriation initially charged with the related expenditure, whether current or expired. If the appropriation is still current, then the funds remain available for further obligation within the time and purpose limits of the appropriation. However; if the appropriation has expired for obligational purposes (but has not yet been closed), the repayment must be credited to the expired account, not to current funds. See 23 Comp. Gen. 648 (1944); 6 Comp; Gen. 337 (1926); B-138942-O.M. August 26,1976. If the repayment relates to an expired appropriation, crediting the repayment to current funds is an improper augmentation of the current appropriation unless authorized by statute. B-114088, April 29, 1953. These same principles apply to a refund in the form of a credit, such as a credit for utility overcharges. B-139348, May 12, 1959; B-209650-O.M. July 20, 1983. Once an appropriation account has been closed in accordance with 31 U.S.C. §§ 1552(a) or 1555, repayments must be deposited as miscellaneous receipts regardless of how they would have been treated prior to closing. 31 U.S.C. 1552(b), as amended by Pub. L. No. 101-510, § 1405 (1990).

Principles of Federal Appropriations Law, Volume II, pages 6-110 through 6-111.

Recoveries for false claims involve a very lengthy process. The time required to investigate a false claim after it is discovered, and then pursue

and obtain a recovery under the False Claims Act, can easily cover several years, and frequently leads to recoveries after appropriation accounts have been closed. In the meantime, current appropriations may be needed to pay for program requirements that would otherwise have been paid for with the funds overpaid because of the false claim. Making recovered funds available for obligation and expenditure allows them to be used for the purpose for which they were appropriated and helps to reduce the programmatic impact of the false claim.

COST AND BUDGETING DATA

The proposal will not increase costs. The proposal will reduce the need to use current year funds to meet requirements where prior year funds are no longer available. Because recoveries under the False Claims Act can vary significantly from year to year, it is not possible to estimate a specific impact for any particular fiscal year.

PROS AND CONS

PROS

-- Returns funds to the programs for which they were appropriated
-- Reduces need for current year funds to pay for prior year requirements

CONS

-- Changes well established current law
-- Current appropriations may have included a factor to account for previous erroneous disbursements, so change may be considered an augmentation of current year appropriations

POINT OF CONTACT

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USALSA REPORT: Procurement Fraud Division Note: The Miscellaneous Receipts Statute and Permissible Agency Recoveries of Monies

NAME: United States Army Legal Services Agency

SUMMARY:
... To anyone generally familiar with the Miscellaneous Receipts Statute (MRS), the settlement structure described above might seem problematical in that the settlement award will not be deposited directly to the U.S. Treasury. ... As a general rule, the MRS requires that all funds received on behalf of the United States be deposited in the general fund of the U.S. Treasury. ... In contrast, the Comptroller General refused FEMA's request to retain the treble damages, determining that any amount collected from a FCA lawsuit which exceeded the agency's actual loses were more in the nature of a civil penalty and must be returned to the Treasury as miscellaneous receipts. ... Last year, the Comptroller General again addressed the issue. ... However, if the appropriation account is "closed," any refund must be returned to the Treasury's general fund as a miscellaneous receipt. ... The agency may retain all funds received that are necessary to pay for the replacement contract, even if the reprocurement costs exceed the cost of the original contract. ... A bona fide need must still exist for the goods or services contemplated in the original contract. The replacement contract "must be of substantially the same size and scope as the original contract and should be executed 'without undue delay' after the original contract is terminated." ...

TEXT:

[*35] Recently, the Boeing Company and the Department of Justice (DOJ) settled two False Claims Act (FCA) n80 *qui tam* law-suits, n81 which alleged Boeing subcontractors provided the Army with defective transmission gear systems for the Chinook helicopter. n82 As part of the settlement, Boeing agreed to pay approximately $ 54 million in damages in addition to $ 7.5 million in legal fees. n83 Significantly, a substantial portion of the settlement amount will be returned directly to open Army contracts at the affected command. As part of the settlement agreement, the Army will receive both goods and services at no additional cost to the government, to include: (1) a $ 23.9 million contract modification that permitted the affected command to receive replacement transmission gears, (2) the waiver of [*36] $ 3.4 million of reinspection costs, and (3) a warranty on over 400 such gears.

To anyone generally familiar with the Miscellaneous Receipts Statute n84 (MRS), the settlement structure described above might seem problematical in that the settlement award will not be deposited directly to the U.S. Treasury. This note will review the restrictions of the MRS and discuss several potential exceptions to the statute that allow an agency to retain funds recovered as a result of criminal, civil, and administrative procurement fraud related actions.

The Miscellaneous Receipts Statute

As a general rule, the MRS requires that all funds received on behalf of the United States be deposited in the general fund of the U.S. Treasury. Specifically, the law provides that "an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim." n85 The general mandate of the MRS applies to "money for the Government *from any source* . . . . The original source of the money--whether from private parties or the government--is thus irrelevant." n86 The United States Court of Appeals for the District of Columbia Circuit described the MRS as "deriving from and safeguarding a principle fundamental to our constitutional structure, the separation-of-powers precept embedded in the Appropriations Clause, that 'no Money shall be drawn from the Treasury, but in Consequence of Appropriations made

by law.'" n87 The MRS precludes the Executive Branch from using these miscellaneous funds without the benefit of the proper exercise of Congress's appropriations authority. n88 Improper obligation and expenditure of such moneys constitutes an "illegal 'augmentation'" of an agency's appropriated funds. n89

Significantly, the MRS only applies to the receipt of money. The Act is not applicable when an agency receives goods or services, n90 as was the case in the Boeing settlement mentioned above. Further, agency receipt of goods or services does not require an "offsetting transfer from current appropriations to miscellaneous receipts." n91 The non-applicability of the MRS holds even if the agency could have received money in lieu of the goods or services and such funds would have been required to be deposited in the U.S. Treasury. n92

There are two established exceptions to the MRS mandate that moneys received on behalf of the United States be deposited in the Treasury: "(1) where an agency is specifically authorized to retain moneys it collects, and (2) where the moneys received qualify as refunds to appropriations." n93 For example, "when a program is funded out of a revolving fund, the enabling legislation ordinarily expressly authorizes the agency to deposit program income into the revolving fund." n94 However, the mere existence of a revolving fund, by itself, does not permit the agency to retain the funds; express statutory authority must still exist. n95 Additionally, in *Security and Exchange Commission-Retention* [*37] *of Rebate Resulting from Participation in Energy Savings Program*, n96 the SEC was permitted to credit part of a rebate received from a utility company directly to that agency as a result of their energy efficiency efforts because the Energy Policy Act of 1992, n97 coupled with the relevant appropriations act, specifically permitted retention of fifty percent of energy efficiency rebates. n98 In the area of affirmative medical recovery, The Federal Medical Care Recovery Act n99 permits military medical treatment facilities to retain recoveries from third-party payers rather than return the money to the Treasury. n100

Criminal Restitution

A statutory exception to the MRS exists for criminal restitution ordered by federal courts directly to agencies. In 1982, Congress passed the Victim and Witness Protection Act (VWPA) n101 in order to "provide restitution to as many victims and in as many cases as possible." n102 Significantly, governmental entities, including federal agencies, are considered victims entitled to restitution under the VWPA. n103 Congress amended the VWPA in 1996 with the passage of the Mandatory Victim Restitution Act (MVRA), n104 which provided for mandatory restitution for certain crimes, n105 "regardless of a defendant's anticipated ability to pay." n106 Governmental agencies remain victims entitled to restitution despite the amendments, n107 but in multiple victim cases the government is the last to be made whole. n108

Agency Recovery in Civil False Claims Act Litigation

The Civil False Claims Act n109 imposes pecuniary liability for false or fraudulent claims. n110 Additionally, one unique feature of the FCA is its *qui tam* provision, which permits a private party to bring a FCA action on behalf of the United States. n111 The FCA provides for double damages and costs in the case of [*38] voluntary disclosures, treble damages otherwise, and a civil penalty of $ 5,500 to $ 11,000 per claim. n112

Significantly, the Comptroller General has characterized certain types of recoveries under the FCA as refunds for purposes of the MRS. In a 1990 opinion involving the Federal Emergency Management Agency (FEMA), the Comptroller General posited that FEMA could retain single damages, interest on that amount, and the administrative costs of investigating the false claims as a result of any FCA award or settlement. n113 These funds were a direct consequence of the fraud and would serve to make the agency whole. n114 In contrast, the Comptroller General refused FEMA's request to retain the treble damages, determining that any amount collected from a FCA lawsuit which exceeded the agency's actual loses were more in the nature of a civil penalty and must be returned to the Treasury as miscellaneous receipts. n115

Last year, the Comptroller General again addressed the issue. In *Tennessee Valley Authority--False Claims Act Recoveries*, n116 the TVA was permitted to retain from a FCA recovery, as a refund, "moneys erroneously disbursed on the basis of the false claim" and "investigative costs . . . directly related to the false claim." n117 Once again, the Comptroller General denied the agency request to retain double and treble damages because they were "exemplary damages, not actual losses" and TVA did not possess statutory authority to retain damages in the nature of a penalty. n118

A significant limitation on agency retention of recovered money is the time required to receive the funds. Oftentimes it will take years to resolve a FCA lawsuit. In *Appropriation Accounting--Refunds And Collectibles*, n119 the Comptroller General determined that refunds may be credited to the appropriation account charged with paying the

original obligation, even if it has "expired," and those funds would then be "available for recording or adjusting obligations properly incurred before the appropriation expired." n120 However, if the appropriation account is "closed," any refund must be returned to the Treasury's general fund as a miscellaneous receipt. n121

No Agency Recovery for PFCRA Actions

The Program Fraud Civil Remedies Act of 1986 (PFCRA) n122 was enacted to provide agencies with an administrative mechanism to take action against any person who submits a false, fictitious or fraudulent claim for payment, n123 usually after the Department of Justice has declined to litigate it. n124 The Act subjects a contractor to a penalty of up to $ 5,500 per false claim or [*39] statement and an assessment of up to double the amount falsely claimed. n125

Because the legislative history indicates that PFCRA was designed to target "small-dollar fraud cases" n126 and because the jurisdictional cap for PFCRA actions is $ 150,000 per claim (or group of related claims), n127 the Act has been characterized as a "mini False Claims Act." n128 Unlike the FCA, which does not specifically address the disposition of money collected as a result of an award or settlement, PFCRA is not silent on the issue. n129 Section 3806(g) specifically states that, with the exception of certain penalties or assessments imposed by the United States Postal Service or the Secretary of Health and Human Services, "any amount of penalty or assessment collected . . . shall be deposited as miscellaneous receipts in the Treasury of the United States." n130 Further, money collected by administrative offset n131 must be treated as miscellaneous receipts and deposited in the U.S. Treasury. n132 As such, in contrast to the FCA, recovery under the PFCRA may not be retained by the agency, even if the amount recovered would be used to make the agency whole. There is, therefore, little incentive for agencies to use it. n133 If the statute could be amended to allow agencies to keep recoveries, however, PFCRA could become a valuable weapon in the arsenal of recovery mechanisms that steer clear of the MRS.

Replacement Contracts

Federal acquisition law provides a number of grounds for default terminations of a contract. n134 In some circumstances, contract fraud may provide grounds to terminate the contract. n135 In *Daft v. United States*, n136 the U.S. Court of Federal Claims stated: "Fraud taints everything it touches[;] . . . consequently, proof of fraud by clear and convincing evidence is a ground for default termination." n137 Further, in *Morton v. United States*, n138 the court sustained a default termination of a "large, [*40] sophisticated contract" for fraud involving a single change order. n139

As a remedy for default terminations, the government is entitled to reprocurement or completion costs. n140 Rather than requiring that reprocurement costs be placed in the U.S. Treasury, an agency may use these funds for replacement contracts. n141 The agency may retain all funds received that are necessary to pay for the replacement contract, even if the reprocurement costs exceed the cost of the original contract. n142 Similarly, money received as liquidated damages, including performance bond money, may be retained by an agency if used to fund a replacement contract. n143 The funds received by the agency are in the nature of "refunds." n144 The rationale for allowing the agency to retain excess costs of reprocurement is "that the money should be used 'to make good the appropriation which will be damaged' by having to incur costs in excess of the original contract price to receive the goods or services that would have been received under the original contract but for the default." n145 This reasoning applies regardless of the type of appropriation. n146

However, the agency is limited in how it uses these funds. The Comptroller General has held that "an agency may only credit the funds to the appropriation charged with the contract that resulted in the liquidated damages. As such, the funds are only available to fund contracts properly chargeable to the original appropriation." n147 A bona fide need must still exist for the goods or services contemplated in the original contract. The replacement contract "must be of substantially the same size and scope as the original contract and should be executed 'without undue delay' after the original contract is terminated." n148

Negotiated Contractual Resolutions

Whenever the Contracting Officer (CO) suspects that a contract has been tainted by fraud, the CO must refer the matter for investigation. n149 The CO may not settle, pay, compromise, or adjust any claim involving fraud. n150 By statute, authority for all fraud-related litigation rests with the DOJ n151 and inherent to that authority is the ability to settle. n152 However, in cases where allegations of fraud are "founded" by criminal investigators, but DOJ has declined criminal and civil action, the CO may [*41] desire to resolve the contractual dispute--subject to DOJ approval--rather than allow the dispute to languish or terminate for default and force the contractor to appeal.

Under such circumstances, the CO will want to structure the contractual resolution in such a manner as to maximize the monetary return directly to the agency. The CO may legitimately obtain goods and services as a replacement-in-kind for nonconforming items or work without triggering the MRS. Further, any monetary relief obtained which is properly characterized as a refund n153 of an erroneous payment or an overpayment, n154 may also be retained by the agency without running afoul of the MRS.

Conclusion

As the Boeing case illustrates, proactive involvement in the resolution of contractual disputes, particularly those involving allegations of fraud, can pay hefty dividends to agency coffers. Judge Advocates should be aware that, despite the fiscal law restrictions contained in the Miscellaneous Receipts Statute, certain procurement fraud-related recoveries may be retained by the agency rather than being deposited in the U.S. Treasury. This note has attempted to identify several avenues for the retention of such recoveries. Lieutenant Colonel Davidson.

FOOTNOTES:

n80 *31 U.S.C. § § 3729*-3733 (2000).

n81 "*Qui tam pro domino rege quam pro se ipso in hac parte sequitur* 'who as well for the king as for himself sues in this matter.'" BLACK'S LAW DICTIONARY 1262 (Bryan A. Garner et al., eds., 7th ed. 1999). A *qui tam* action is one brought under a statute that allows a private person to sue for a penalty, part of which the government will receive. *Id.* In the case of the FCA, the statute authorizes an individual, acting as a private attorney general, to bring suit in the name of the United States and gives the government sixty days to decide whether to join the action. If the government joins the suit, it conducts the action. *31 U.S.C. § 3730.* If the government decides not to join, the individual, known as the "relator," conducts the action. *See id.*

n82 *Miscellany*, 42 GOV'T CONTRACTOR 18, P319 (Aug. 9, 2000); *Boeing Moves To Have Judge Removed In Helicopter Whistleblower Case*, SEATTLE TIMES, July 7, 1997, at D. 1, *available at* http://archives.seattletimes.nwsource.com/cgi-bin/texis/web/vortex/display?slug=boe&date=19970707. The DOJ assumed control of a *qui tam* lawsuit filed by Brett Roby, alleging Speco, a Boeing subcontractor, made hundreds of faulty transmission gears that were installed in helicopters delivered by Boeing to the Army. *Id.*

n83 *Miscellany, supra* note 82, at 18. A portion of the settlement amount was made contingent on unsuccessful appeals by Boeing of several district court rulings. Boeing made no admissions of liability. United States *ex rel.* Brett Roby v. The Boeing Co., No. C-1-95-375 (S.D. Ohio Aug. 3, 2000) (Settlement Agreement).

n84 *31 U.S.C. § 3302*(b).

n85 *Id.*

n86 *Scheduled Airlines Traffic Office, Inc. v. Department of Defense, 87 F.3d 1356, 1362 (D.C. Cir. 1996)* (emphasis in original).

n87 *Id. at 1361* (citations omitted).

n88 *Id. at 1362* ("By requiring government officials to deposit government monies in the Treasury, Congress has precluded the executive branch from using such monies for unappropriated purposes.").

n89 Securities and Exchange Commission - *Retention of Rebate Resulting From Participation In Energy Savings Program, B-265734, 1996 U.S. Comp. Gen. LEXIS 82,* at * 8 (Feb. 13, 1996).

n90 *Bureau of Alcohol, Tobacco, and Firearms--Augmentation of Appropriations--Replacement of Autos by Negligent Third Parties, B-226004, 1988 U.S. Comp. Gen. LEXIS 770,* at *3 (July 12, 1988) ("The miscellaneous receipts statute is applicable only when money, as opposed to goods or services, has been provided to the agency.").

n91 *Id.*

n92 *Id.*

n93 Tennessee *Valley Authority--False Claims Act Recoveries, B-281064, 2000 U.S. Comp. Gen. LEXIS 98,* at * 4-5 (Feb. 14, 2000). For purposes of the second exception, the General Accounting Office (GAO) has defined a refund as "returns of advances, collections for overpayments, adjustments for previous amounts disbursed, or recovery of erroneous disbursements from appropriations or fund accounts that are directly related to, and are reductions of, previously recorded payments from the accounts." *Id.* at *5-6 (*citing* 7 GAO POLICY AND PROCEDURES MANUAL FOR THE GUIDANCE OF FEDERAL AGENCIES § 5.4.A.1 (n.d.)).

n94 *Federal Emergency Management Agency--Disposition of Monetary Award Under False Claims Act, B-230250, 1990 U.S. Comp. Gen. LEXIS 426,* at *4 (Feb. 16, 1990); *see also TVA, 2000 U.S. Comp. Gen. LEXIS 98,* at *5. A revolving fund is a "fund established to finance a cycle of operations through amounts received by the fund. Within the Department of Defense, such funds include the Defense Working Capital Fund, as well as other working capital funds." U.S. DEP'T OF DEFENSE, REG. 7000.14-R, FINANCIAL MANAGEMENT REGULATION, vol. 2A, ch. 1, para. 010107.49 (Jan. 22, 2001), *available at* http://www.dtic.mil/comptroller/fmr/02a/Chapter01.pdf.

n95 *FEMA, 1990 U.S. Comp. Gen. LEXIS 426,* at *4 ("Our Office has held that if the legislation establishing a revolving fund does not expressly authorize an agency to deposit receipts of a particular type into the revolving fund and there is no other basis for doing so, those receipts--even if related in some way to the programs the revolving fund supports--must be deposited in the Treasury as miscellaneous receipts."); *accord TVA, 2000 U.S. Comp. Gen. LEXIS 98,* at *5.

n96 *B-265734, 1996 U.S. Comp. Gen. LEXIS 82,* at *1 (Feb. 13, 1996).

n97 *42 U.S.C. § 8256*(c) (2000).

n98 *SEC, 1996 U.S. Comp. Gen. LEXIS 82,* at *5-7.

n99 *10 U.S.C. § 1095* (2000).

n100 *Id.* § 1095(g)(1) ("Amounts collected under this section from a third-party payer or under any other provision of law from any other payer for health care services provided at or through a facility of the uniformed services shall be credited to the appropriation supporting the maintenance and operation of the facility and shall not be taken into consideration in establishing the operating budget of the facility.").

n101 *18 U.S.C. § 3663* (2000).

n102 *United States v. Martin, 128 F.3d 1188, 1190 (7th Cir. 1997).* The VWPA provided federal courts with the authority to order restitution without making the order a condition of probation. *Id.*

n103 *Id.* ("federal courts have consistently held that governmental entities can be 'victims' under the VWPA."). According to the Seventh Circuit, agencies or entities entitled to restitution include the Postal Service, the Small Business Administration, Medicare and the Department of Labor. *Id. at 1190-91* (citations omitted). The court also noted cases in other circuits authorizing restitution to such agencies as the Department of Labor, Social Security Administration, Federal Bureau of Investigation, Department of Housing and Urban Development, Department of Agriculture and the Department of Defense. *Id. at 1191* (citations omitted).

n104 *18 U.S.C. § 3663A* (codification of Pub. L. No. 104-132, § 204(a), 112 Stat. 1227). The MVRA "governs actions dating from April 24, 1996." *United States v. Malpeso, 126 F.3d 92, 94 n.1 (2nd Cir. 1997).*

n105 Mandatory restitution must be ordered in cases where the defendant has been convicted or plead guilty to crimes of violence, property crimes including those "committed by fraud or deceit," and certain offenses involving "tampering with consumer products." *18 U.S.C. § 3663A*(c)(1)(a).

n106 *Weinberger v. United States, 71 F. Supp. 2d 803, 809 (S.D. Ohio 1999).*

n107 *Martin, 128 F.3d at 1192.*

n108 *18 U.S.C. § 3664*(i) ("In any case in which the United States is a victim, the court shall ensure that all other victims receive full restitution before the United States receives any restitution.").

n109 *31 U.S.C. § § 3729*-3733 (2000).

n110 *Id.* § 3729(a).

n111 *Id.* § 3730(b).

n112 *Id.* § 3729(a) (as adjusted for inflation by DOJ, Civil Monetary Penalties Inflation Adjustment, *28 C.F.R. § 85.3(a)(9) (2000)*).

n113 *Federal Emergency Management Agency--Disposition of Monetary Award Under False Claims Act, B-230250, 1990 U.S. Comp. Gen. LEXIS 426,* at *2 (Feb. 16, 1990).

n114 *Id.* at *9.

n115 *Id.* at *10.

n116 *B-281064, 2000 U.S. Comp. Gen. LEXIS 98,* at *1 (Feb. 14, 2000).

n117 *Id.* at *6.

n118 *Id.* at *7 ("In the absence of statutory authority, agencies must deposit into the Treasury amounts recovered that are in the nature of penalties."); *see also, Public Int. Research Group of N.J. v. Powell Duffryn Term., Inc., 913 F.2d 64, 82 (3rd Cir. 1990)* (stating that civil penalties in Clean Water Act cases must be paid to the U.S. Treasury); *accord United States v. Smithfield Foods, Inc., 982 F. Supp. 373 (E.D. Va. 1997).* As a general rule, any "penalty which is imposed pursuant to a federal statute, in a suit brought by the federal government . . . constitutes 'public money' . . . [and] as such, it must be deposited with the Treasury, in accordance with the Miscellaneous Receipts Act, unless otherwise specified by Congress." *Id. at 374.*

n119 *B-257905, 1995 U.S. Comp. Gen. LEXIS 821,* at *1 (Dec. 26, 1995).

n120 *Id.* at *6.

n121 *Id.* To illustrate, Operation & Maintenance appropriations expire after one fiscal year (FY), but are closed five years after the end of the original FY. In FY 1 the Army contracts for widgets, but is overcharged and receives defective widgets. The Army, or a *qui tam* relator, files a FCA suit against the contractor, who settles in FY 5. Money recovered pursuant to a FCA award or settlement that represents the Army's actual losses as a result of the fraud may be returned to the expired OMA account. However, if the case is resolved when the OMA account has closed, the entire recovery must be deposited in the general fund of the U.S. Treasury.

n122 *31 U.S.C. § § 3801*-3811 (2000).

n123 *Orfanos v. Department of Health And Human Serv., 896 F. Supp. 23, 24-25 (D.D.C. 1995)* (citing *31 U.S.C. § 3802* and stating that the PFCRA was "enacted in 1986 to allow federal departments and agencies . . . to pursue administrative actions against individuals for false, fictitious or fraudulent claims for benefits or payments under a federal agency program.").

n124 S. REP. No. 99-212, at 8, 10 (1985); *see also* Major Uldric L. Fiore, *Program Fraud Civil Remedies Act--The "Niche" Remedy*, ARMY LAW., Sept. 1990, at 58 (stating that "PFCRA cases must not be subject to DOJ/U.S. Attorney civil action. PFCRA does not require criminal declination, but an ongoing criminal investigation usually indicates PFCRA is at least premature.").

n125 *31 U.S.C. § 3802* (as adjusted for inflation by DOJ, Civil Monetary Penalties Inflation Adjustment, *28 C.F.R. § 85.3(a)(10) (2000)*); *see also* S. REP. No. 99-212, at 19 ("The sponsors of [the bill] always intended . . . that the assessment would be calculated only on the false portion of the claim."). In March 1991, the Army

achieved its first successful PFCRA recovery when a subcontractor agreed to pay double damages of $ 5,000 plus $ 10,000 in penalties. Procurement Fraud Division Note, *Army Procurement Fraud Program--Recent Developments*, ARMY LAW., Aug. 1991, at 22, 23 (*Army Obtains First DOD Recovery Under The Program Fraud Civil Remedies Act*).

n126 S. REP. No. 99-212, at 5, 8, 10.

n127 *31 U.S.C. § 3803*(c)(1)(A) & (B).

n128 S. REP. No. 99-212, at 24; *see also id. at 34* ("The Program Fraud bill is based on the civil False Claims Act--serving as the administrative alternative for small-dollar false claims . . . .").

n129 *Federal Emergency Management Agency--Disposition of Monetary Award Under False Claims Act, B-230250, 1990 U.S. Comp. Gen. LEXIS 426,* at *9 n.2 (Feb. 16, 1990) (holding that the FCA is silent on the issue, while the PFCRA is not).

n130 *31 U.S.C. § 3806*(g)(1) & (2); *see also* S. REP. No. 99-212, at 50 ("Any penalty and assessment collected shall be deposited as miscellaneous receipts in the U.S. Treasury.").

n131 Offset authority permits "an agency to deduct the amount of any sum owed by a person under a Program [sic] Fraud proceeding from amounts otherwise owed to that person from the United States." S. REP. No. 99-212, at 30.

n132 *38 U.S.C. § 3807*(b); *see also* S. REP. No. 99-212, at 50 ("All amounts retained through setoff . . . shall be deposited as miscellaneous receipts in the U.S. Treasury.").

n133 The PFCRA in fact acts as a disincentive because the agency must bear the costs of litigation in an administrative hearing. The Army Procurement Fraud Division is currently pursuing its first PFCRA case in almost a decade.

n134 "The standard default clauses identify three different grounds for termination: (1) failure to deliver the product or complete the work or service within the stated time, (2) failure to make progress in prosecuting the work and thereby endangering completion, and (3) breach of 'other provisions' of the contract." JOHN CIBINIC, JR. & RALPH C. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 908 (3rd ed. 1995). Two nonenumerated grounds include the failure to proceed and anticipatory repudiation. *Id.*

n135 *Id.* at 938 (*citing in part* GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 52.203-3 (June 1997) (anti-gratuities clause) [hereinafter FAR]); *41 U.S.C. § § 51*-54 (2000) (Anti-kickback Act, prohibiting any subcontractor from making a gift to a contractor or higher-tier subcontractor as inducement for the award of a subcontract).

n136 *31 Fed. Cl. 682 (1994), aff'd, Daff v. United States, 78 F.3d 1566 (Fed. Cir. 1996).*

n137 *Id.* at 688. The court also held that a termination for default based on fraud can be supported by additional fraud discovered after the initial termination decision. *Id.* Affirming the decision, the United States Court of Appeals for the Federal Circuit found a valid reason to default the contractor in addition to fraud, "defective contract performance," but declined to address the issue of whether a contracting officer could terminate for default based *solely* on fraud. *Daff, 78 F.3d at 1572 n.9.*

n138 *757 F.2d 1273 (Fed. Cir. 1985).*

n139 In *Morton*, the contractor "pointed out there were approximately 950 alterations and change orders by the government." *Id. at 1277.*

n140 CIBINIC & NASH, *supra* note 134, at 998 ("Excess costs of reprocurement or completion are the unique remedies given to the Government upon a valid default termination.").

n141 Major Timothy D. Matheny, *Go On, Take te Money and Run: Understanding the Miscellaneous Receipts Statute and Its Exceptions*, ARMY LAW. Sept. 1997, at 31, 39 (citations omitted) ("The GAO recognizes an exception allowing an agency 'to retain recovered excess reprocurement costs to fund replacement contracts.'").

n142 *Id.*

n143 *National Park Service--Disposition of Performance Bond Forfeited To Government by Defaulting Contractor, B-216688, 64 Comp. Gen. LEXIS 625,* at *6 (June 20, 1985). Excess reprocurement costs reflect the government's actual costs and are "based on the difference in price between the defaulted contract and the reprocurement contract as adjusted for all increases in the original contract price to which the defaulted contractor is entitled, and for any cost increases resulting from changes in the work or Government misconduct under the reprocurement contract." CIBINIC & NASH, *supra* note 134, at 1042. Liquidated damages reflect the parties' reasonable estimate of the government's damages in the event of breach or termination. *Id.* at 1050-51. The government may recover both excess reprocurement costs and liquidated damages. *Id.* at 1049. Despite the distinction between the two, the Comptroller General has opined that when liquidated damages are used to fund a replacement contract, any legal distinction between liquidated damages and reprocurement costs "is not pertinent." *National Park Service, 64 Comp. Gen. LEXIS 625,* at *6.

n144 *Department of Interior--Disposition of Liquidated Damages Collected for Delayed Performance, B-242274, 1991 U.S. Comp. Gen. LEXIS 1072,* at *2-3 (Aug. 27, 1991) ("An agency may, however, deposit receipts that constitute refunds, including amounts collected as liquidated damages, to the credit of the appropriation or fund charged with the original expenditure.").

n145 Army Corps of Engineers - Disposition of Funds Collected in *Settlement of Faulty Design Dispute, B-220210, 65 Comp. Gen. 838* at *4-7 (Sept. 8, 1986). In this case, the Comptroller General stated further that "if the agency could not retain the funds for the purpose and to the extent indicated, it could find itself effectively paying twice for the same thing, or possibly, if it lacked sufficient unobligated money for the reprocurement, having to defer or forego a needed procurement, with the result in many cases that much if not all of the original expenditure would be wasted." *Id. at *6.*

n146 *Id.* at *9 (holding that the type of appropriation, to include a multi-year appropriation, would make no difference).

n147 *Department of Interior, 1985 Comp. Gen. LEXIS 625,* at *3.

n148 *Id.* at *4.

n149 FAR, *supra* note 135, at 33.209. The Army Procurement Fraud Division is authorized to receive such referrals directly from the CO and a Procurement Fraud Advisor should be contacted in the event of a fraud investigation. U.S. DEP'T OF ARMY, REG. 27-40, LITIGATION, para. 8.3(a)(2) (19 Sept. 1994).

n150 FAR, *supra* note 135, at 33.210. Additionally, the Contract Disputes Act, *41 U.S.C. § 605*(a) (2000), precludes the agency, and the CO as an agent of the agency, from resolving disputes involving fraud. *TDC Management Corp., DOT BCA No. 1802, 90-1 BCA P22,627, at 113, 492.*

n151 *28 U.S.C. § 516* (2000).

n152 *United Technologies Corp., ASBCA No. 46880, 95-2 BCA P27, 698; see also 4 C.F.R. § 101.3 (2000)* ("Only the Department of Justice has authority to compromise, suspend, or terminate collection action on [false claims or those where there is an indication of fraud].").

n153 "In situations where we treated a contract adjustment or price renegotiation as a refund that could be credited to an [originally charged] appropriation . . . the 'refund' reflected a change in the amount the government owed its contractor based on the contractor's performance or a change in the government's requirements." *Securities and Exchange Commission-Reduction of Obligation of Appropriated Funds Due To a Sublease, B-265727, 1996 Comp. Gen. LEXIS 374,* at *1 (July 19, 1996).

n154 Matheny, *supra* note 141, at 40 (citations omitted). The return of these types of payments may also be characterized as a refund. Rebates from *Travel Management Center Contractors, B-217913, 65 Comp. Gen. LEXIS 600,* at *4 (May 30, 1986).

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ARTICLE: Go On, Take the Money and Run: Understanding the Miscellaneous Receipts Statute and Its Exceptions

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SUMMARY:

... Not only must one keep up with the impact of the statutory changes, but one must keep up with recent General Accounting Office (GAO) decisions. ... The money collected under this provision must be deposited into the General Fund of the United States Treasury as a miscellaneous receipt, absent any exception. ... In *Department of Justice -- Deposit of Amounts Received from Third Parties as Payment for Damage for Which Government Has Already Compensated Plaintiff*, the GAO determined that "it was proper for the agency to retain the amount recovered from carriers or insurers up to the amount spent in advance payment to an employee due to damage or loss of the employee's personal property." ... Next, is there a specific statutory exception granted by Congress which allows the money to be retained in the appropriation to be augmented rather than requiring the money to be forwarded to the Treasury as a miscellaneous receipt? Third, if there is no specific statutory authorization, are there any GAO decisions which create an exception to the MRS? Fourth, when no exception can be found, is there any alternative to receiving money? ...

HIGHLIGHT: Department of the Army Pamphlet 27-50-298

TEXT:

[*31] **Introduction**

As you return from a Continuing Legal Education course in estate planning, you pick up your luggage and notice that the suitcase in which you packed your government-issued laptop is damaged. You plug in the laptop, only to find that it does not work. You kick yourself for packing it and file a claim with the airline. On the trip home, you wonder whether you can accept the check the airline will be sending you to repair the laptop.

The following Monday, you discover several phone messages from the head of Friends of the United States, n1 an international private organization (IPO). You know from past experience that this is not a group you want to deal with when you have the laptop question on your mind. The IPO wants to buy six new Pentium computers with the "works" and donate them to the General and his staff.

Both of the scenarios above involve fiscal law. Although most military and civilian attorneys have been able to avoid fiscal law issues, it is clear that the law of money is extremely important to the accomplishment of the mission in the high operations tempo and continued draw-downs of today. Understanding and dealing with fiscal law issues are much less complicated than one might think. As with other areas of the law, there is a basic framework upon which to build.

Three statutes that serve as an important part of the framework for the proper use of the appropriations made by Congress are the Purpose Statute, n2 the Anti-Deficiency Act (ADA), n3 and the Miscellaneous Receipts Statute (MRS). n4 While the Purpose Statute and the ADA have both been the subject of several articles, neither of these statutes is widely understood. The MRS is an equally important part of the framework of appropriations, yet even less attention has been paid to the MRS and the issue of augmentation of appropriated funds. Indeed, many military practitioners are unfamiliar with the issues in fiscal law governed by these three fiscal law principles, until they find themselves facing an ADA investigation n5 or an augmentation issue. n6

One of the most difficult challenges in dealing with an MRS issue is that there is no single reference source. n7 The exceptions to the MRS are scattered throughout the United States Code and Public Law. Another problem is that this area of the law changes constantly. Not only must one keep up with the impact of the statutory changes, but one must keep up with recent General Accounting Office (GAO) decisions. While it is impossible for this article to cover every exception to the MRS, n8 the [*32] first goal is to familiarize the military practitioner with the MRS and the exceptions that are most common to military practice.

The second goal of this article is to suggest a four-step process military practitioners may use as a framework for analyzing MRS issues they may encounter in everyday practice. This four-step process can serve as a general template when trying to analyze an MRS augmentation issue. The four-step process begins with determining what appropriation is being augmented. Second, determine if there is a specific statutory exception granted by Congress which allows the money to be retained in that appropriation rather than returning the money to the Treasury as a miscellaneous receipt. Third, if there is no specific statutory authorization, determine whether there are any GAO decisions creating an exception to the MRS. Fourth, when no exception can be found, look to see if there is any alternative to receiving money.

Background

In the United States government, Congress has the power of the purse. n9 "No money shall be drawn from the treasury except in consequence of appropriations made by law." n10 Therefore, it is Congress that determines what level of appropriations any given agency shall receive. A basic principle of fiscal law is that augmentation of appropriations is not permitted. An augmentation of an appropriation occurs when an agency takes an action which increases the amount of funds available in an appropriation. n11 This can result in the agency spending more money than was originally appropriated by Congress. n12

It is possible to have an augmentation of funds resulting from either a violation of the Purpose Statute or the MRS. A Purpose Statute augmentation occurs when one appropriation is used to pay the costs associated with the purposes of another appropriation. n13 An augmentation in violation of the MRS occurs when an agency receives and retains funds from a source outside the appropriations process rather than forwarding the funds to the General Fund of the U.S. Treasury as miscellaneous receipts. n14

Legislative History and Purpose of the MRS

Prior to the enactment of the MRS in 1849, government officials would collect money owed to the United States and use the funds to pay various expenses, including their own salaries in some instances, rather than forwarding the money and drawing against a fund established for payment of salaries and expenses. n15 By passing the MRS, Congress was reasserting control over the public purse and preventing unchecked spending on the part of the Executive Branch. Today, the MRS is codified at *31 U.S.C. § 3302*(b) and provides that "all money [*33] received by government agents or officials from any source must be deposited in the Treasury as soon as practicable." n16

There are penalties associated with violating the statute, such as "removal from office or forfeiture of money, in any amount, to the Government held by the official or agent to which they may be entitled." n17 The money collected under this provision must be deposited into the General Fund of the United States Treasury as a miscellaneous receipt, absent any exception.

Over the years, the GAO has interpreted the MRS and its application. The GAO repeatedly has held that it is money, not other types of property, received by governmental agencies that triggers the prohibition. n18 It is critical in analyzing an MRS problem to remember that, in most instances, the augmentation issue arises when dealing with the acceptance of money.

Application of the MRS -- Statutory Exceptions

Over the years, Congress, for a variety of reasons, recognized that it was desirable to provide executive agencies with some statutory exceptions to the MRS. These exceptions allow the agencies to keep the money rather than forwarding it to the General Fund of the United States Treasury. n19

Several of the statutory exceptions enacted by Congress have an impact on the contracting practices of the Department of Defense (DOD). Every day, military attorneys use two of the exceptions to the MRS discussed in the following paragraphs, the Economy Act and the Project Order Statute, without much thought as to the underlying MRS issue.

Appropriated Funds Contracts

The Economy Act. The Economy Act provides statutory authority for interagency orders. n20 Using the Economy Act, any governmental agency may order goods or services from any other governmental agency. n21 The statute requires the ordering agency to reimburse the servicing agency for the goods or services provided. n22 The servicing agency may retain the money, depositing it into the same appropriation which was used to obtain the goods or services. If the servicing agency is unable to deposit the money into the appropriation which was used to perform the Economy Act order, the agency must forward the money to the Treasury. n23 To deposit the money into an appropriation which had not been used for the order would result in an improper augmentation. n24

Project Orders. The Project Order Statute, which is similar to the Economy Act, provides authority for the ordering of goods or services between the military departments and government-owned and government-operated establishments [*34] within the DOD. n25 In passing the Project Order Statute, Congress gave the departments and agencies within the DOD the authority to conduct business with each other, allowing the servicing agency to retain funds in its appropriation paid by the ordering agency without violating the MRS. n26

The New Kid in Town. A new exception to the MRS appeared in the 1997 National Defense Authorization Act (NDAA). n27 The NDAA adds a new code section, *10 U.S.C. § 2482a,* which appears to create the equivalent of the Project Order Statute and the Economy Act for the Defense Commissary Agency and Nonappropriated Fund Instrumentalities (NAFIs). This new section allows NAFIs to enter into contracts or agreements with other agencies and instrumentalities within the DOD or with another federal department, agency, or instrumentality to provide or obtain goods or services that are beneficial to the efficient management and operation of the exchange system or the morale, welfare, and recreation system. n28 While the new section does not specifically mention reimbursement of the costs to the servicing agency, it makes sense only if it is read and interpreted as an exception to the MRS just like the Economy Act and the Project Order Statute. n29

Revolving Funds. Revolving Funds were created by Congress to provide agencies with a management tool in the form of "working capital funds" n30 or "management funds" n31 that provide for the operation of certain activities. Revolving funds are normally established with an initial appropriation from Congress. Once the revolving fund is established, any payment received for goods or services provided through the revolving fund are then deposited back into the revolving fund. n32 The Defense Business Operating Fund (DBOF) n33 is an example of a working capital revolving fund. Customer agencies place their orders with the DBOF and pay the DBOF for the goods or services upon receipt. n34 Since these revolving funds are authorized by Congress, they may be terminated at any time by Congress. n35

[*35] *A Problem Area for Appropriated Funds Contracting: Nonappropriated Funds Contracts*

Normally, the MRS applies only to appropriated funds contracting. However, there are some "cross-over" n36 nonappropriated funds (NAF) contracts for services which are impacted by the MRS. How can this happen? It can happen through the combining of appropriated and nonappropriated fund needs for services into a single solicitation. n37 In *Scheduled Airline Traffic Offices, Inc. v. Department of Defense,* n38 a DOD agency's appropriated fund contracting officer attempted to combine requirements for both official and unofficial travel services into one solicitation. n39 The solicitation required the concession fee paid for official travel to be forwarded to the General Fund of the Treasury and the concession fees for the unofficial travel would be deposited into the local morale fund. n40 The court stated, "we have no doubt that concession fees for unofficial travel constitute money for the Government within the meaning of the statute." n41 As a result, the court held the money was a miscellaneous reccipt and that it was being improperly diverted from the General Fund of the Treasury. The court ordered that the funds be deposited into the Treasury and remanded the case to the district court. n42

Other Areas of Application in Government Practice

Most military practitioners would reason that since the MRS is a fiscal principle, it must impact only on contracting issues. Nothing could be further from the truth. In fact, the MRS impacts on many areas of military practice. Congress has given executive agencies numerous statutory exceptions to handle underlying MRS issues in handling claims issues, gifts, property law issues, environmental law, and foreign relations.

Claims

Recovering Health Care Expenditures. Most attorneys who have been claims officers have dealt with the health care recovery program. In enacting *10 U.S.C. § 1095,* n43 Congress recognized the need to recover military health care expenditures from third party payers. In order to provide incentives for the military services to engage in more aggressive recovery of money spent for health care, Congress created an exception to the MRS under *10 U.S.C. § 1095*(g). n44 This provision of the statute allows "the military medical facility to retain amounts collected from third

party insurers n45 for medical treatment provided to [*36] eligible recipients and credit them to the facility's operation and maintenance appropriation." n46

A New Day in Recovering Pay? A new exception was created by Congress in the 1997 NDAA in the area of claims recoveries. An amendment to *42 U.S.C. § 2651* allows the United States "to [recover] from a third party the pay of members of the uniformed services as a result of tortious infliction of injury or disease." n47 As a result:

> [The] United States has an independent right to recover from the third party, the third party's insurer, or both, the amount equal to the total amount of pay that accrues or is accrued for the period that the member is unable to perform duties as a result of the injury or disease and is not assigned to perform other military duties. n48

Any money that the United States recovers under this provision "shall be credited to the appropriation that supports the operation of the command, activity, or other unit to which the member was assigned at the time of the injury or illness, as determined under regulations prescribed by the Secretary concerned." n49 This change means that the unit suffering the loss of the services of the member may now recover the costs of the loss and retain it in the appropriate appropriation.

Gifts

Most military practitioners are familiar with the DOD guidance and service regulations concerning gifts. n50 However, many practitioners do not stop to think about the fiscal implications of accepting a gift. n51

Defense Cooperation Account. Normally, "agencies are not allowed to accept gifts absent statutory authority because it would constitute an improper augmentation of funds." n52 In enacting *10 U.S.C. § 2608,* n53 Congress provided authority for the Secretary of Defense "to accept monetary gifts or real or personal property for defense programs, projects, and activities from any person, foreign government, or international organization." n54 "Any money that is given as gifts may not be expended until appropriated by Congress." n55 However, "property that is given may be used in the form in which it was given, sold or otherwise disposed of, or converted into a more usable [*37] form." n56 The statute was recently amended to allow the Secretary to "accept from any foreign government or international organization any contribution of services made by such foreign government or international organization for use by [the] DOD." n57

The Handling of Property

Occasionally, an MRS issue arises when dealing with the replacement of damaged government property or the proceeds from the rental of government property.

Real Property Rental. Historically, any money received from real property leases was forwarded to the Treasury as miscellaneous receipts. Congress changed this practice by enacting *10 U.S.C. § 2667*(d)(1). n58 This provision allows the military to deposit into special accounts all money received from the leasing of any non-excess real property. n59 The money deposited from rentals shall be used for facility maintenance, repair, or environmental restoration. n60

Real Property Damage Recovery. n61 If a military member causes damage to DOD real property, an exception to the MRS allows the service "to deduct the money from the member's pay to repair or replace the property." n62 But what about damage caused by someone who is not a member of the armed forces? Congress addressed this issue by providing another exception to the MRS. Now "any amount recovered for damage to real property may be credited to the account available for repair or replacement of the real property at the time of recovery." n63

Personal Property. Prior to the enactment of *10 U.S.C. § 2575,* n64 the proceeds from the sale of lost, abandoned, or unclaimed personal property found on an installation were considered miscellaneous receipts that had to be forwarded to the Treasury. Now these proceeds may be deposited into the installation operations and maintenance (O&M) account. n65 The proceeds should first be used "to pay for any costs associated with collecting, storing, and disposing of the property." n66 Any funds remaining after reimbursement of costs may be deposited into the accounts of morale, welfare, and recreation activities. n67

[*38] *The Environment*

Environmental considerations impact the practice of law in the DOD every day. Again, many military practitioners do not think about how the MRS impacts various environmental programs and how they may be accomplished. n68

Turning Garbage Into Money. In an effort to provide the DOD with incentives to establish aggressive recycling programs, Congress created an exception to the MRS at *10 U.S.C. § 2577.* n69 Paragraph (b)(1) allows the installation to take the proceeds from these programs and deposit them into their O&M accounts to cover the costs of operations, maintenance, and overhead associated with processing recyclables. Further provisions allow for the use of up to fifty percent of these funds to pay for installation projects for pollution abatement, energy conservation, or occupational health and safety. The remaining proceeds go into installation morale, welfare, and recreation funds. n70 However, should any military installation accumulate a balance at the end of any fiscal year in excess of $ 2 million, all money in excess of $ 2 million shall be forwarded as miscellaneous receipts. n71

Separate Environmental Restoration Accounts. In the 1997 NDAA, Congress established separate environmental restoration accounts for each military department. n72 In addition, Congress addressed the issue of credits for amounts recovered. "Any amounts that are recovered under a CERCLA n73 response action or any amounts recovered from a contractor, insurer, surety or other person to reimburse the military department for any expenditure for environmental response activities, shall be credited to the appropriate environmental restoration account." n74

Foreign Relations

The impact of recent world events and changing foreign policies have had an impact on the practice of military law. Deployments are numerous, as the United States projects its military presence around the world to fulfill its foreign policy objectives. The MRS impacts on some of these operational issues, and military practitioners must remember that the MRS still applies. In order to assist the DOD in accomplishing its mission, Congress has provided numerous exceptions to the MRS. n75

Host Nations Help Defray Expenses. In order to safeguard United States interests, the armed forces have been deployed with increasing frequency. In *10 U.S.C. § 2350k,* n76 Congress provides an exception to the MRS that allows a nation hosting United States forces to contribute to the costs of the relocation of those forces within the host country. "The Secretary of Defense may now accept contributions from any nation of or in [*39] support of the relocation of elements of the armed forces from or to any location within the nation." n77

To Transfer or Not To Transfer? That is The Question. In an effort to further the intent of the Foreign Assistance Act (FAA), Congress created numerous exceptions to the MRS. One such exception is found at *22 U.S.C. § 2392.* n78 This exception gives the President the authority to transfer State Department funds to other government agencies, including the DOD. Such "reimbursement shall be in an amount equal to the value of the defense articles or the defense services, or other assistance as furnished, plus any incidental expenses arising from or incident to operations." n79 Based upon this authority, augmentation of an appropriation will not be considered a violation of the MRS. n80

Application of the MRS -- Exceptions Recognized By The Comptroller General

Case law from the GAO has created numerous exceptions to the MRS. Many of these exceptions focus on contracting. However, the GAO also recognizes the need for exceptions in the handling of government property.

In The Contracting Arena

Replacement Contracts. The GAO recognizes an exception allowing an agency "to retain recovered excess reprocurement costs to fund replacement contracts." n81 This allows the agency to maintain the funds and to use them to fund replacement contracts whether the money is reimbursement for damages due to defective workmanship or the government is terminating the contract for default. There is a caveat to this exception; "the agency may only retain the amount of funds necessary to reprocure the goods or services that would have been provided under the original contract." n82 "Any excess money will be considered miscellaneous receipts and must be deposited into the Treasury." n83

Refunds. Occasionally an agency will be entitled to a refund. n84 As a general rule, in the absence of express statutory authority, agencies must credit refunds to the appropriation originally charged with the related costs, regardless of whether the appropriation is current or expired. n85 There may be times when the agency decides not to retain the refund for various reasons. If that is the case, the agency may forward the refund to the General Fund as a miscellaneous receipt. n86

[*40] *Erroneous Payments, Overpayments, or Advance Payments.* A number of GAO cases discuss when an agency may retain an erroneous payment, overpayment, or advance payment. In *Department of Justice -- Deposit of Amounts Received from Third Parties as Payment for Damage for Which Government Has Already Compensated Plaintiff*, n87 the GAO determined that "it was proper for the agency to retain the amount recovered from carriers or insurers up to the amount spent in advance payment to an employee due to damage or loss of the employee's personal property." n88 In *International Natural Rubber Organization -- Return of United States Contribution*, n89 the GAO held that "repayments to the United States, which were actually excess or overpayments made to the International Natural Rubber Organization, could be retained in the appropriation from which those dues are paid." n90

False Claims Act Recovery. In *Federal Emergency Management Agency -- Disposition of Monetary Award Under False Claims Act*, n91 the GAO held that agencies may retain certain portions of a damage award or settlement made pursuant to the False Claim Act (FCA). n92 The agency may "retain a portion of monetary recoveries received under an FCA judgment or settlement as reimbursement for false claims, interest, and administrative expenses." n93 If "treble damages and penalties are collected pursuant to the statute, those funds must be deposited as miscellaneous receipts." n94

Other Areas of Application in Governmental Practice

The most common noncontracting issues impacted by the exceptions created by the GAO are those involving the handling of damaged government property. In *Defense Logistics Agency -- Disposition of Funds Paid In Settlement of Contract Action*, n95 the GAO examined the disposition of funds recovered by an agency for damage to government property. The GAO concentrated on the definitions of "refund" and "receipt" of money from sources outside the appropriations process. The GAO ruled that the "funds received could not be credited to the appropriation charged, as the damage was unrelated to the contract's performance." n96 The fact that the agency received a check in the amount of $ 114,934.14 from the insurer, which resulted in the check being treated as money received by the agency, was crucial to the GAO's decision. Since money could not be credited to an appropriation, the money had to be forwarded as miscellaneous receipts. n97

So what happens if an agency receives property instead of cash for damaged property? May the agency keep property offered in lieu of cash to replace government property damaged by a negligent third party? The GAO has held that "when the agency receives replacement property for damaged government property, the agency may retain the property." n98 It is important to remember, as the GAO points out, n99 that the MRS applies to augmentation of an appropriation with money from a source outside the appropriations process. Therefore, the agency may keep the property replaced in this instance. In practice, it makes no difference whether it is the negligent third party or his insurer who is replacing the damaged government property.

Analyzing MRS Issues

So, where does a military practitioner start in trying to determine the appropriate course of action in the scenarios described at the beginning of this article? The four-step process proposed in the introduction can assist the military practitioner in analyzing MRS augmentation issues. First, determine what appropriation [*41] is being augmented. Next, is there a specific statutory exception granted by Congress which allows the money to be retained in the appropriation to be augmented rather than requiring the money to be forwarded to the Treasury as a miscellaneous receipt? Third, if there is no specific statutory authorization, are there any GAO decisions which create an exception to the MRS? Fourth, when no exception can be found, is there any alternative to receiving money?

Damage to a Government Computer

What about the traveler who discovered the damaged government laptop, filed the claim, and agreed to accept a check? Is it really in the government's best interest to accept a check if the goal is to get the laptop repaired or replaced?

First, identify the appropriation that will be augmented by acceptance of the check. In this instance, assume that installation O&M funds have been used to purchase the laptop. n100 Does the traveler have authority to augment the installation O&M account? Remember that the money cannot be retained in the installation O&M account to repair or to replace the laptop without an exception to the MRS. Absent an exception, any amount received should be treated as a miscellaneous receipt and forwarded to the Treasury.

The next two steps are to determine whether there is a statutory or GAO-created exception to the MRS available so that the unit may retain the money in its O&M appropriation. Based upon the discussion of the statutory and GAO-

created exceptions for handling property, above, n101 practitioners should quickly conclude that there is no statutory or GAO-created exception to receive money in this instance.

Finally, if there is no exception allowing the retention of the money, is there an alternative for replacing or repairing the laptop? Until Congress sees fit to allow the retention of money paid for personal property damage, the answer here must be a creative "yes." The GAO has repeatedly held that the MRS applies only to the receipt of money. How does the traveler manage to avoid the problem of receiving a check? He should work a settlement with the airline or its insurer which allows the traveler to take the computer to an authorized repair shop and to have the repair shop bill the airline directly. Another solution would be for the airline to replace the unit's computer by purchasing another computer and providing it in settlement for the damage.

Use of Gifts Provided by International Private Organizations

How should one handle the offer made by the Friends of the United States to purchase and donate six new Pentium computers? Normally, the first step would be to identify the appropriation that the unit is seeking to augment. However, because of the statutory exception that will apply in this instance, the local unit's appropriation is not a factor.

Next, practitioners should look to see if there is either a statutory or GAO-created exception available to justify the acceptance of the gifts from the IPO. In this instance, research should lead to the statutory exception provided at *10 U.S.C. § 2608* discussed previously in this article. n102 After coordination through appropriate channels, it is possible for the DOD to accept the gift of the six computers. Remember, this authority allows the Secretary of Defense to accept gifts of money or real or personal property for use in defense programs, projects, or activities.

Proposed Changes for the Future?

Many contracting officers believe that Congress should consider changing the law to allow "cross-over" nonappropriated contracts to be combined by appropriated fund contracting officers when needed. n103 In this time of downsizing and doing more with less, it makes no sense to require separate contracts and administration when time and money may be saved by joint solicitation and administration. A statutory change would allow an appropriated fund contracting officer to solicit and to administer certain types of contracts that overlap some services paid for by appropriated funds. n104 This would provide an exception to the MRS. Congress could add safeguards against potential abuse by adding restrictions to the percentage of commission [*42] that would be passed through the contract to the morale, welfare, and recreation fund. n105

As to damage to government property, Congress has provided the DOD with many exceptions that have allowed the DOD to recover for damage to its real property and, in some instances, personal property, in the form of equipment and furniture when associated with damaged real property. Indeed, under the Report of Survey system, government employees and members of the armed forces are required to reimburse the government for any lost, damaged, or stolen property. n106 It is time for Congress to take the next step and to allow the DOD an exception which would enable local units who suffer damage to accept funds to repair or to replace government-owned personal property. n107 Any concerns for potential abuses can be dealt with by simply providing statutory language requiring any funds not used to repair or to replace the damaged or destroyed property to be forwarded as miscellaneous receipts. n108

Changes also appear likely in the area of procurement fraud. "Congress has asked the Secretary of Defense to report on the possibility of allowing the DOD to retain a portion of any recovery made under the procurement fraud statutes to provide the incentive to encourage more aggressive procurement fraud recovery programs." n109 "It has been suggested that the DOD retain three percent of single damage funds or $ 500,000, whichever is less, recovered in fraud cases which would be retained in the installation O&M appropriation." n110 This would be similar in concept to the program that is currently in place for the hospital recovery program and would be more than sufficient incentive to energize these programs in a fashion similar to the hospital recovery program. Additionally, this would allow the retention of a part of the costs associated with the fraud programs which are mandated by Congress in the first place. n111

Conclusion

The MRS impacts much more of military practice than contracts and claims. It is an important part of the fiscal law framework and the practice of military law. The exceptions to the MRS, both statutory and GAO-created, make it much easier for the DOD and its departments to perform their missions without running afoul of the MRS. Every military practitioner should be familiar with the basics of the MRS, its applications, and the exceptions that impact many areas of their practice. From contracts to claims, and in fulfilling the military's assigned missions in the foreign relations arena, the MRS can have an impact on the way the mission is accomplished and its success.

FOOTNOTES:

n1 This is a fictitious organization.

n2 *31 U.S.C. § 1301*(a) (1994).

n3 *Id.* § 1341; *see id.* § § 1342, 1517.

n4 *Id.* § 3302(b). There are other statutes that are equally important in analyzing fiscal law issues. *See* The Bona Fide Needs Statute, *id.* § 1502(a); The Impoundment Control Act of 1974, *2 U.S.C. § § 681*-688 (1997); *31 U.S.C. § 1512*(c)(2) (1994). The facts involved in each specific issue will determine what parts of the framework practitioners must use to answer the particular question asked.

n5 For example, an ADA investigation is required when an agency's officer or employee makes or authorizes an obligation or expenditure that exceeds the amount available in an appropriation or fund. *See 31 U.S.C. § 1341*(a)(1)(A). Another example of when an ADA investigation would be required is when an agency's officer or employee involves the government in a contractual obligation for payment of money before an appropriation is made, unless otherwise authorized by law. *See id.* § 1341(a)(1)(B).

n6 An augmentation occurs when an agency takes an action which increases the amount of funds available in an agency's appropriation. This normally occurs in one of two ways, which are discussed later in this article. *See infra* notes 13-14 and accompanying text.

n7 There are two references that may be used for starting points in analyzing an MRS problem. The GAO discusses augmentation of funds in one of its publications. *See* 2 GENERAL ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW ch. 6, § E (2d Ed. 1992) [hereinafter RED BOOK] (This book is often referred to as the GAO "Red Book."). The Army Judge Advocate General's School, Contract Law Department's Fiscal Law Deskbook is another excellent resource when confronted with an MRS issue. *See* CONTRACT L. DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA-506, FISCAL LAW COURSE DESKBOOK (May 1996).

n8 For example, there is an MRS exception at *10 U.S.C. § 423* (1994) that deals with the use of proceeds from counter-intelligence operations of the military departments to fund those types of operations until the funds are no longer needed.

n9 For an excellent article on Congress' power of the purse, see Kate Stith, *Congress' Power of the Purse, 97 YALE L.J. 1343 (1988).*

n10 U.S. CONST. art. I, § 9, cl. 7.

n11 Availability of Receipts from *Synthetic Fuels Projects for Contract Admin. Expenses of the Dep't of Treasury, Office of Synthetic Fuels Projects, B-247644, 72 Comp. Gen. 164* (Apr. 9, 1993).

n12 This may lead to a violation of the Antideficiency Act. *31 U.S.C.A. § § 1341,* 1517 (1996). *See* Gary L. Hopkins and Robert M. Nutt, *The Anti-Deficiency Act (Revised Statute 3679) and Funding Federal Contracts: An Analysis, 80 MIL. L. REV. 51 (1978).*

n13 For example, the nonreimbursable use of a sending agency's employees, whose wages are paid by the sending agency, by a receiving agency results in an improper use of the sending agency's funds and an unlawful augmentation of the receiving agency's appropriations. *Department of Health and Human Servs. -- Detail of Office of Community Servs. Employees, B-211373, 64 Comp. Gen. 370* (Mar. 20, 1985). *See Nonreimbursable Transfer of Admin. Law Judges, B-221585, 65 Comp. Gen. 635* (June 9, 1986) (statutory authority did not allow the transfer of 15 to 20 National Labor Relations Board administrative law judges on a nonreimbursable basis); *U.S. Gov't Printing Office, B-247348, 1992 WL 152986* (Comp. Gen. June 22, 1992) (nonreimbursable detail of Government Printing Office (GPO) employee pursuant to a settlement agreement made under Title VII of the Civil Rights Act violates statutory prohibition against using GPO employees to do work other than public printing and binding and illegally augments another agency's appropriation). *But see, 3 U.S.C. § 112* (1994) (providing authority for nonreimbursable details to the White House); *Honorable William D. Ford, Chairman, Comm. on Post Office and Civil Serv., House of Representatives, B-224033, 1987 WL 101529* (Comp. Gen. Jan. 30, 1987) (detailing of Schedule C employees to an agency other than the one to which they have been appointed); *Details to Cong'l Comms., B-230960, 1988 WL 227433* (Comp. Gen. Apr. 11, 1988) (detail of agency employees to Congressional committee is appropriate, provided that the detail furthers the purposes for which the agency's appropriations are available).

n14 For example, the "interest earned on unauthorized loans made by an agency pursuant to a grant program become receipts that should be forwarded to the treasury." *Interest Earned on Unauthorized Loans of Fed. Grant Funds, B-246502, 71 Comp. Gen. 387* (May 11, 1992). *See Use of Appropriated Funds by the Air Force to Provide Support for Child Care Centers for Children of Civilian Employees, B-222989, 67 Comp. Gen. 443* (June 9, 1988) (payments received by the Air Force for its capital improvement expenditures in providing space for civilian child care centers must be deposited in the Treasury as miscellaneous receipts).

n15 The Act of March 3, 1849, 9 Stat. 398 (providing that all funds received from customs, sale of public lands, and all miscellaneous sources be paid to the Treasury). For example, the legislative history discusses customs officers who had authority to collect various customs and import duties and retained the money to pay their salaries and expenses.

n16 *31 U.S.C. § 3302*(b) (1994) ("Except as provided in section 3718(b) of this title, an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim."). *31 U.S.C. § 3718*(b) provides authority for agencies to contract for collection services. These contracts can be for the recovery of indebtedness or to locate or to recover assets of the United States. This does not cover any debts owed to the Internal Revenue Service. Section (d) provides that the fee for this contract can be paid from the amount recovered. *See GSA Transp. Audit Contracts, B-198137, 64 Comp. Gen. 366* (Mar. 20, 1985) (use of proceeds recovered from carriers and freight forwarders for services to recover delinquent amounts owed to the United States). *See also Acceptance of Payment by Commercial Credit Card, B-177617, 67 Comp. Gen. 48* (Nov. 6, 1987) (credit card company commissions must be paid from agency's current operating appropriations, rather than be deducted from the credit card transaction itself).

n17 *31 U.S.C. § 3302*(d).

n18 *Bureau of Alcohol, Tobacco, and Firearms -- Augmentation of Appropriations -- Replacement of Autos by Negligent Third Parties, B-226004, 67 Comp. Gen. 510* (July 12, 1988).

n19 It should be noted that what Congress giveth, Congress can taketh away. For example, in 1992, Congress added a provision to the Arms Export Control Act that allowed the DOD to use money received from the sales of tanks, infantry fighting vehicles, and armored personnel carriers for upgrades to those vehicles. *See 22 U.S.C. § 2761*(j) (Supp. IV 1992). This provision worked as an exception to the miscellaneous receipts statute until it was deleted. *See* National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 112, 110 Stat. 206 (1996).

n20 *31 U.S.C. § 1535.*

n21 *Id.* § 1535(a).

n22 *Id.* § 1535(h). *See* Economy Act Payments After Obligated Account Is Closed, B-260993, June 26, 1996, 96-1 CPD P 287.

n23 For example, this might occur if the money is to be deposited into a closed appropriation. Since the closed appropriation is no longer available for use, the money must be forwarded to the General Fund of the Treasury as a miscellaneous receipt.

n24 Hypothetically, the Air Force (a DOD agency) places an order with the NASA (a non-DOD government agency) for the purpose of obtaining some research. The Air Force would reimburse the NASA for the services procured, and the NASA would deposit the money into the appropriation used to pay for the services. The GAO has held that the Economy Act, not the Project Order Statute, applies to DOD orders to non-DOD agencies. *See General Counsel, Library of Congress, B-246773, 72 Comp. Gen. 172* (May 5, 1993).

n25 *41 U.S.C. § 23* (1994). Project Order authority for the Coast Guard is found at *14 U.S.C. § 151* (1988). Government-owned and government-operated establishments are also referred to as GOGOs.

n26 Hypothetically, the Army (a DOD agency) may contract with the Air Force (a DOD agency) to provide some maintenance for its helicopters. Assuming the project order is properly completed, the Army pays the Air Force for the maintenance performed and the Air Force places the money into the appropriation used for obtaining such services. Again, if for some reason they cannot deposit the funds into the appropriation that was charged to obtain the service, then the money must be forwarded to the Treasury for deposit as a miscellaneous receipt. The GAO has held that the Project Order Statute applies between DOD and DOD GOGOs. *See General Counsel, Library of Congress, B-246773, 72 Comp. Gen. 172* (May 5, 1993).

n27 National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 341, 110 Stat. 2488-2489 (1996).

n28 *Id.*

n29 To interpret the new section otherwise would render it unusable. The whole idea behind this new provision was to give these entities the tools to allow more efficient management and to promote efficiency in their operations. *See* H.R. REP. No. 104-563, at 278, 110 Stat. 2989 (1996). The statute also appears to authorize

NAFIs to sell to appropriated fund activities. Normally, NAFIs are not subject to the requirements of the MRS, and selling goods or services to appropriated fund activities should not cause them to fall within the requirements of the MRS.

n30 *10 U.S.C. § 2208* (1994).

n31 *Id.* § 2209.

n32 *Id.* § 2208(h).

n33 The DBOF was established by Congress on 1 October 1991, by combining nine different stock and industrial funds into the one fund. The DBOF was codified as an entity in 1996 at *10 U.S.C. § 2216. See* National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 371, 110 Stat. 186 (1996).

n34 There are numerous other revolving funds scattered throughout the United States Code. *See 31 U.S.C. § 3720* (1988) (authorizing agency heads to establish a Cash Management Improvements Fund for collection of payments); *42 U.S.C. § 10601* (1994) (authorizing the Crime Victims Fund). *See also National Technical Information Serv. -- Use of Customer Advance Deposits For Operating Expenses, B-243710, 71 Comp. Gen. 224* (Feb. 10, 1992) (discussing the National Technical Information Service's use of money deposited into a revolving fund created by *15 U.S.C. § 1526* (1994)) and *Administrator, Veterans Admin., B-116651, 40 Comp. Gen. 356* (Dec. 13, 1960) (discussing the Veterans Administration's use of funds deposited into a revolving supply fund created by *38 U.S.C. § 5011* (1994)).

n35 For example, the Panama Canal Commission Fund was terminated, and the unappropriated balance was transferred to the Panama Canal Revolving Fund. *See 22 U.S.C. § 3712*(a)(2) (1994). While the Panama Canal Commission Fund was not named a revolving fund, it was a fund used to obligate appropriations. The same principle would apply to the Panama Canal Revolving Fund, which will no longer be needed at some point in the future.

n36 The term "cross-over" is used to identify those nonappropriated funds (NAF) contracts that are solicited and/or administered by an appropriated fund contracting officer. This is required by some service regulations when the NAF contract exceeds a certain dollar threshold or when the NAF contracting officer does not feel he has the expertise to compete the contract in question. *See* U.S. DEP'T OF ARMY, REG. 215-4, MORALE, WELFARE, AND RECREATION: NONAPPROPRIATED FUND CONTRACTING, paras. 1-8d and 3-11 (10 Oct. 1990); U.S. DEP'T OF AIR FORCE, AIR FORCE INSTR. 64-301, NONAPPROPRIATED FUND CONTRACTING, para. 5 (18 Apr. 1994); U.S. DEP'T OF AIR FORCE, AIR FORCE FEDERAL ACQUISITION REG. SUPP. 5301.602-1 (May 1, 1996). This term should not be read to imply that appropriated funds are used to fund the NAF contract.

n37 With the continuation of budget and personnel down-sizing, it is tempting to become creative in generating additional funds for very important morale, welfare, and recreation quality of life programs. However, great care should be taken in the mixing of the appropriated and nonappropriated funds needs for service. The courts have found these types of arrangements to be a violation of the MRS in the past. It is wise to consult the appropriate agency regulation and to seek guidance from higher headquarters before issuing the solicitation. *See also Reeve Aleutian Airways, Inc. v. Donald E. Rice, 789 F. Supp. 417 (D.D.C. 1992)* (failing to cite any statutory authority, solicitation requiring contribution to morale fund violated the MRS); *Motor Coach Industry, Inc.*

v. Dole, 725 F.2d 958 (4th Cir. 1984) (holding that the Federal Aviation Administration's diversion of airport-user fees to purchase buses violated the MRS).

n38 *87 F.3d 1356 (D.C. Cir. 1996).*

n39 Initially, Scheduled Airline Traffic Offices (SATO) filed two protests with the GAO. The GAO denied both of these protests. *See* SATO, Inc., B-257292.5, Sept. 21, 1994, 94-2 CPD P 107 (SATO challenge to solicitation); SATO, Inc., B-253856.7, Nov. 23, 1994, 95-1 CPD P 33 (SATO challenge to award). The GAO's decisions were upheld in an unreported decision by the United States District Court for the District of Columbia. *See SATO v. Department of Defense, Civ. A. No. 94-2128 (JHG), 1994 WL 715608,* at * 1 (D.D.C. Dec. 9, 1994).

n40 *See Scheduled Airline Traffic Offices, Inc., 87 F.3d 1356.*

n41 *Id. at 1362.* The court focused on the fact that the fees generated for the morale, welfare, and recreation account were derived from a government procurement contract where travel agents paid fees in consideration for government resources (i.e., the right to occupy agency office space, to utilize government services associated with that space, and to serve as the exclusive on-site travel agent).

n42 The district court ordered the DOD to deposit all unofficial travel money received after 5 July 1996 into the United States Treasury. The district court further enjoined the DOD from considering, in the solicitation of a contractor for official travel services, the amount of concession fees offered or paid for unofficial travel services. *See* Scheduled Airline Traffic Offices v. Department of Defense, C.A. No. 94-2128 (JHG) (D.D.C. Nov. 25, 1996).

n43 *10 U.S.C. § 1095* (Supp. V 1993). *See* Collection From Third Party Payers of Reasonable Costs of Healthcare Services, 32 C.F.R. § 220 (1996).

n44 National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 727(a)(2), 103 Stat. 1480-81 (1989).

n45 The definition of third party insurer has been expanded to include workers' compensation programs or plans. *See* National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 735(b), 110 Stat. 2598-99 (1996) (amending *10 U.S.C. § 1095*(h)(1)). *See also* Affirmative Claims Note, *Medical Payments Coverage and 10 U.S.C. § 1095*, ARMY LAW., Dec. 1996, at 37.

n46 *10 U.S.C. § 1095*(g) (Supp. I 1989). *See* U.S. DEP'T OF AIR FORCE, AIR FORCE INSTR. 51-502, PERSONNEL AND GOVERNMENT RECOVERY CLAIMS, para. 5.20 (1 Mar. 1997) (providing guidance on depositing collections). If the military treatment facility recovers more than the amount demanded, the excess should be forwarded as miscellaneous receipts. If *10 U.S.C. § 1095* is not the basis for recovery, the money must be forwarded as a miscellaneous receipt.

n47 National Defense Authorization Act for Fiscal Year 1997, § 1075, 110 Stat. at 2661-63.

n48 *Id.* at 2661-62. A new subsection (b) is added to *42 U.S.C. § 2651.* The old subsection (b) is redesignated as subsection (d).

n49 *Id.* § 1075(f)(2), 110 Stat. at 2662. As of the date of the submission of this article, the author had been unable to find any published guidance on this issue from the offices of the Secretary of Defense or of the service secretaries. However, the United States Army Claims Service (USARCS) has provided some guidance on this statutory change. *See* Affirmative Claims Note, *Lost Wages Under the Federal Medical Care Recovery Act,* ARMY LAW., Dec. 1996, at 38. The USARCS has taken the position that the recovered money goes into the installation operations and maintenance account, even though the money used to pay the soldier came from the Army Military Pay Account. While this means that the money goes into a different account, this interpretation appears to be consistent with the intent of the statute -- to reimburse the affected command.

n50 *See* U.S. DEP'T OF ARMY, REG. 1-100, ADMINISTRATION, GIFTS AND DONATIONS (15 Dec. 1983); U.S. DEP'T OF ARMY, REG. 1-101, ADMINISTRATION, GIFTS FOR DISTRIBUTION TO INDIVIDUALS (1 June 1981); U.S. DEP'T OF AIR FORCE, AIR FORCE INSTR 51-601, GIFTS TO THE DEPARTMENT OF THE AIR FORCE (19 July 1994); U.S. DEP'T OF AIR FORCE, AIR FORCE INSTR. 51-901, GIFTS FROM FOREIGN GOVERNMENTS (21 July 1994). These regulations cover gifts to the agency and to the individual. Nonappropriated Fund Instrumentalities have different rules, and practitioners should consult the appropriate agency NAFI regulation or instruction.

n51 A gift, donation, or bequest has been defined by the GAO as a gratuitous conveyance or transfer of ownership in property without any consideration. *See Secretary of the Interior, B-56153, 25 Comp. Gen. 637* (Mar. 7, 1946). The GAO has also defined what is not a gift. *See Federal Communication Commission -- Acceptance of Rent-Free Space and Servs. at Expositions and Trade Shows, B-210620, 63 Comp. Gen. 459* (June 28, 1984) (free exhibit space and appurtenant services at industry trade shows, exhibitions, conventions, and other similar events does not involve an augmentation, because there is no donation of funds).

n52 *Chairman, United States Civil Serv. Comm'n, B-128527, 46 Comp. Gen. 689* (Mar. 7, 1967). *See Edward P. Borland, Chairman, Subcomm. on HUD-Independent Agencies -- Comm. on Appropriations, House of Representatives, B-225986, 1987 WL 101592* (Comp. Gen. Mar. 2, 1987).

n53 *10 U.S.C. § 2608* (Supp. III 1991). This statute was enacted as part of a joint resolution continuing appropriations for fiscal year 1991. The same resolution contained a supplemental appropriation for Operation Desert Shield for fiscal year 1990, as well as addressing other issues. The statute replaced *50 U.S.C. § 1151,* which was repealed. The old act had allowed the acceptance of conditional gifts to further defense efforts. *See 22 U.S.C. § 2697* (1988) (gift acceptance authority for the Secretary of State). The authority to administer the account, to receive payments and contributions to the account, and to deposit money into and to pay from the account have been delegated to the Under Secretary of Defense (Comptroller)/Chief Financial Officer. *See* U.S. DEP'T OF DEFENSE, DIR. 5118.3, DELEGATIONS OF AUTHORITY, para. 1j (1997).

n54 *10 U.S.C. § 2608*(a) (Supp. III 1991). The Department of the Air Force has issued instructions for handling gifts from foreign governments under *10 U.S.C. § 2608. See* U.S. DEP'T. OF AIR FORCE, AIR FORCE INSTR. 51-601, GIFTS TO THE DEPARTMENT OF THE AIR FORCE, para. 1.8 and ch. 4 (19 July 1994).

n55 *10 U.S.C. § 2608*(c).

n56 *Id.* at § 2608(d).

n57 National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 1063, 110 Stat. 2652-53 (1996). However, the amendment does not appear to provide authority for the Secretary to accept services from an individual person. Acceptance of voluntary services are generally prohibited, absent specific statutory authority. *See 31 U.S.C. § 1342* (1994). However, in some instances, Congress has granted some agencies the authority to accept both gifts and voluntary and uncompensated services. *See 15 U.S.C. § 2076*(b)(6) (1994) (giving the Consumer Product Safety Commission the authority to accept gifts and voluntary and uncompensated services).

n58 *10 U.S.C. § 2667*(d)(1) (Supp. II 1990). This authority also applies to any personal property that is under the control of the department in question. The use of proceeds resulting from the transfer, sale, or use of excess property is governed by the provisions of *40 U.S.C. § 485*(h) (Supp. II 1990).

n59 Money received under a lease that are amounts paid for utilities and services furnished lessees by the Secretary; under agricultural or grazing leases; or at bases earmarked for closure under the Defense Base Closure and Realignment Act of 1990 may not be deposited into the special account. *See 10 U.S.C. § § 2667*(d)(1)(A), (d)(4)-(5); Pub. L. No. 104-106, § 2831(a)(2), 110 Stat. 558 (1996).

n60 *10 U.S.C. § 2667*(d)(1)(B) states that 50 percent of the amount available shall be allocated to the military installation where the leased property is located and the other 50 percent shall be available to the military department concerned.

n61 Currently, there is no statutory exception to the MRS to allow the retention of funds to replace or to repair government-owned personal property. *See infra* notes 94-96, 104-106 and accompanying text.

n62 *10 U.S.C. § 2775* (1994). Service regulations should be consulted to determine the extent of a member's individual liability.

n63 *Id.* § 2782. The statute specifically excepts the provisions set forth in *10 U.S.C. § 2775* for recovery from a member of the armed forces. *Id.*

n64 *Id.* § 2575, *as amended by* National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 374(a)(1), 110 Stat. 281 (1996).

n65 *Id.* § 2575(b)(1).

n66 *Id.* § 2575(b)(1)(a).

n67 *Id.* § 2575(b)(1)(b).

n68 One issue that is not covered in this article is whether the creation of Supplemental Environmental Projects (SUPs) diverts money from the Treasury in violation of the MRS. These SUPs are normally created as part of a settlement relating to fines and penalties associated with violating certain environmental statutes such as the

Clean Water Act and the Clean Air Act. *See* Laurie Droughton, *Supplemental Environmental Projects: A Bargain for the Environment, 12 PACE ENVTL. L. REV. 789 (1995);* Martin Harrell, *Organizational Environmental Crime and the Sentencing Reform Act of 1984: Combining Fines with Restitution, Remedial Orders, Community Service, and Probation to Benefit the Environment While Punishing the Guilty, 6 VILL. ENVTL. L.J. 243 (1995); see also* Michael Paul Stevens, *Limits on Supplemental Environmental Projects in Consent Agreements to Settle Clean Water Act Citizen Suits, 10 GA. ST. U. L. REV. 757 (1994);* Elizabeth R. Thagard, *The Rule That Clean Water Penalties Must Go to the Treasury and How to Avoid It, 16 HARV. ENVTL. L. REV. 507 (1992).*

n69 *10 U.S.C. § 2577* (1994).

n70 *Id.* § 2577(b)(2)-(3).

n71 *Id.* § 2577(c). This means that any funds in excess of a $ 2 million balance is to be forwarded to the General Fund of the Treasury.

n72 National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 321, 110 Stat. 2477-79 (1996).

n73 CERCLA stands for the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. This act is found at *42 U.S.C. § § 9601*-75 (1994).

n74 National Defense Authorization Act for Fiscal Year 1997, § 321, 110 Stat. at 2477-79.

n75 Congress has also provided statutory exceptions for the DOD to carry out its mission and to avoid augmentation issues that violate the Purpose Statute. Numerous exceptions have been created which allow the detailing of any agency's personnel in an effort to further the aims of the Foreign Assistance Act. For example, *22 U.S.C. § 2387* (1994) allows the detail of officers and employees to foreign governments or foreign government agencies so long as there is no oath of allegiance to, or compensation from, the foreign country. *See also id.* § 2388 (detailing officers or employees to serve with international organizations, or to serve as members of the international staff of such organizations, or to render any technical, scientific, or professional advice or service to the organization); *id.* § 1451 (allowing details of United States employees to provide scientific, technical, or professional advice to other countries with the exception of assistance to the training of the armed forces of those countries); *id.* § 712 (allowing detail of members of the armed forces to assist in military matters in any republic in North, Central, or South America; the Republics of Cuba, Haiti, or Santo Domingo; or any other country during a war or declared national emergency).

n76 *10 U.S.C.A. § 2350k* (West Supp. 1997).

n77 *Id.* § 2350k(a). It is this authority which allows the Secretary of Defense to enter into discussions with the host nation concerning the costs of relocating United States troops within the host country. As a result of the terrorist bombing of the Khobar Towers compound near Dhahran, Saudi Arabia, it was decided that United States troops needed to be relocated within the host nation of Saudi Arabia. The cost splitting agreement, which then Secretary of Defense Perry negotiated with Saudi Arabian Minister of Defense Prince Sultan, could be based upon this gift acceptance authority. *See* CNN with Associated Press, *U.S. and Saudis to Share Cost of Moving Troops* (visited July 31, 1996) <http://www.cnn.com/world>.>

n78 *22 U.S.C. § 2392.*

n79 *Id.* § 2392(d).

n80 Another exception is found at *22 U.S.C. § 2357,* which allows any governmental agency to furnish commodities or services on a reimbursable basis to friendly foreign countries and to international organizations for purposes consistent with Subchapter I of the FAA. Reimbursement under this provision cannot be waived. Under this provision, whether or not an appropriation is allowed to be reimbursed or the money is required to be forwarded to the Treasury depends on when the reimbursement is received. Initially, reimbursements will be deposited into the agency account. Funds that are received within 180 days of the end of the fiscal year may be deposited into the current account. However, funds received outside that 180-day period will be forwarded to the General Fund of the Treasury as a miscellaneous receipt. *See* GAO REP. NO. GAO/NSIAD-94-88, COST OF DOD OPERATIONS IN SOMALIA, Mar. 1994.

n81 Bureau of Prisons -- Dispositions of Funds Paid in *Settlement of Breach of Contract Action, B-210160, Sept. 28, 1983, 62 Comp. Gen. 678, 84-1* CPD P 91.

n82 *Id. at 682-83. See also* Army Corps of Engineers -- Disposition of Funds Collected in *Settlement of Faulty Design Dispute, B-220210, 65 Comp. Gen. 838* (Sept. 8, 1986) (agency may retain money recovered as additional costs to reimburse appropriation).

n83 Bureau of Prisons -- Dispositions of Funds Paid in *Settlement of Breach of Contract Action, 62 Comp. Gen. at 678, 683.*

n84 In this context, refunds are amounts collected from outside sources for payments made in error, overpayments, or adjustments for previous amounts disbursed, to include authorized advances. *See* RED BOOK, *supra* note 7, at 6-109. Embezzled funds which are recovered are also considered refunds. *See* Appropriation Accounting Refunds and Uncollectibles, B-257905, Dec. 26, 1995, 96-1 CPD P 130. The rule on refunds also applies when dealing with a credit. For example, a refund in the form of a "credit" for utility overcharges. *See* RED BOOK, *supra* note 7, at 6-111.

n85 *Secretary of War, B-40355, 23 Comp. Gen. 648* (Mar. 1, 1944). There are also statutory provisions for various agencies on this point. *See* Treasury, Postal Service, and General Government Appropriations Act for Fiscal Year 1996, Pub. L. No. 104-52, § 625, 109 Stat. 502 (1995); *Department of the Interior -- Disposition of Liquidated Damages Collected for Delayed Performance, B-242274, 1991 WL 202596* (Comp. Gen. Aug. 27, 1991) (liquidated damages may only be credited to the appropriation charged with the contract that resulted in the damages).

n86 Accounting for Rebates from *Travel Management Center Contractors, B-217913.3, 73 Comp. Gen. 210* (June 24, 1994).

n87 *B-205508, 61 Comp. Gen. 537* (July 19, 1982).

n88 *Id. at 540.*

n89 *B-207994, 62 Comp. Gen. 70* (Dec. 6, 1982).

n90 *Id.*

n91 *B-230250, 69 Comp. Gen. 260* (Feb. 16, 1990).

n92 *31 U.S.C. § 3729* (1994). *See 18 U.S.C. § 287* (1994) (concerning criminal penalties associated with false claims act prosecutions).

n93 *Federal Emergency Management Agency, 69 Comp. Gen. at 264.*

n94 *Id.*

n95 *B-226553, 67 Comp. Gen. 129* (Dec. 11, 1987).

n96 *Id. at 130.*

n97 This is true of any funds received as a result of a pro-government claim against any third party for damage to government-owned personal property. *See* U.S. DEP'T OF AIR FORCE, AIR FORCE INSTR. 51-502, PERSONNEL AND GOVERNMENT RECOVERY CLAIMS, para. 4.14 (1 Mar. 1997).

n98 *Bureau of Alcohol, Tobacco, and Firearms -- Augmentation of Appropriations -- Replacement of Autos by Negligent Third Parties, B-226004, 67 Comp. Gen. 510* (July 12, 1988).

n99 *Id.*

n100 For the purpose of illustrating this problem, assume the computer was properly purchased with O&M funds.

n101 *See supra* notes 61-63, 95-99 and accompanying text.

n102 *See supra* notes 52-57 and accompanying text.

n103 As a result of a district court order, a working group was formed to propose draft legislation to amend 10 U.S.C. Chapter 147. The proposed draft legislation would allow the Secretary of Defense to procure official and unofficial travel services in a single solicitation. It would also allow any commissions or fees received to be deposited in the respective appropriated or nonappropriated fund account. Additionally, based upon the recom-

mendations of the working group, the Office of the Undersecretary of Defense for Acquisition and Technology issued interim guidance in March 1997 concerning the procurement of travel services.

n104 This would squarely address the court's concern in *Scheduled Airline Traffic Offices*, as Congress would be basically authorizing appropriated fund support to the NAF by providing: free space and services for the contractor, the time of the appropriated funds contracting officer, and the ability to be the exclusive on-site travel agency.

n105 For example, they could mandate a fixed NAF concession fee of no more than two or three percent. This would take the NAF concession fee out of the equation in considering the awarding of a contract; it would be the same for all bidders, and there would be no "incentive" for awarding the contract to someone whose bid included a higher concession fee for NAF. The focus would still be who provided the best deal for the dollar on the appropriated fund solicitation. There is no language in the draft legislation to address this concern, which was articulated by the court in *Scheduled Airline Traffic Offices.*

n106 *See* U.S. DEP'T OF AIR FORCE, MANUAL 23-220, REPORTS OF SURVEY FOR AIR FORCE PERSONNEL, para. 16.2.13 (1 July 1996). *See also* U.S. DEP'T OF DEFENSE, DEFENSE FINANCE AND ACCOUNTING SERVICE-DENVER CENTER REG. 177-102, COMMERCIAL TRANSACTIONS AT BASE LEVEL, pt. V (31 Jan. 1996).

n107 This is the next logical step, given the newly-expanded authority provided under *10 U.S.C. § 2575.* If an installation can retain the proceeds from the sale of lost, abandoned, or unclaimed nongovernment personal property, the installation should be able to accept and to retain funds to repair or to replace damaged government-owned personal property. New authority in this area could serve as an additional incentive for aggressive pro-government claims collection, as has been seen in both the hospital recovery and recycling programs.

n108 If the unit decides not to have the item repaired or replaced, the unit should not be allowed a windfall, and the money should be considered a miscellaneous receipt.

n109 Major Timothy J. Pendolino et al., *The Fiscal Year 1996 Department of Defense Authorization Act: Real Acquisition Reform in Hiding?*, ARMY LAW., Apr. 1996, at 19 (citing the National Defense Authorization Act for Fiscal Year 1996, Pub. L. 104-106, § 1052, 110 Stat. 186, 440 (1996). *See* S. REP. NO. 104-112, at 218 (1995).

n110 *Id.*

n111 This would allow for fraud recoveries in concert with, and in addition to, the use of the False Claims Act. *See supra* notes 91-94 and accompanying text.

VICTIM'S RIGHTS AND THE MISCELLANEOUS RECEIPTS STATUTE
Getting Contract Fraud Recoveries Back in USAF Coffers

Basic to our notion of justice in our society is that when a victim is ripped off, and the stolen merchandise is recovered, the victim gets it back. When the police tackle a fleeing purse snatcher, they don't return the purse and its contents to the victim's employer; they return it to the victim. Like many things, however, our schoolyard intuition about what is fair doesn't always translate to how the federal government does business, particularly when it comes to recovery of money from contract fraud investigations. It pays us, therefore, to understand why, in the federal context, the victim doesn't always get the purse.

The stakes are large, and growing larger. The DoD drive toward outsourcing and privatization means more contractors will be doing more things at more bases in more areas. Odds are that contract fraud investigations will be a growth industry for us in the years to come. Big money is involved. In FY 97, AFOSI central and base-level contract fraud investigations yielded over $200 million in recoveries!

Unfortunately, we recover only a fraction of that money back into the injured account. A hefty chunk of it goes back into the general treasury. There are a number of complicated legal explanations for this, and a good portion of the problem is beyond our power to correct. But there are some things we can do which can improve our ability to return stolen money to the actual victim—the Air Force. Better understanding of one of fiscal law is a first step towards organizing our cases intelligently, advocating our interests to the right people at the right time, and taking advantage of legal opportunities to put money back in the commander's hands.

The taproot principle of fiscal law is found in the U.S. Constitution, which declares that "no money shall be drawn from the treasury except in consequence of appropriations made by law." That means that only Congress can give us money. It is their jealously guarded constitutional prerogative—the power of the purse. It stands to reason, therefore, that Congress would forbid any augmentation of a congressional appropriation. Why? An augmented appropriation means that a federal agency might spend money in excess of that appropriated by Congress or, worse still, spend it for a purpose Congress disapproves. When an agency spends money in excess of an appropriation, it implicates the Anti-Deficiency Act, 31 U.S.C. §§ 1341, 1517, which can result in civil, criminal, and pecuniary liability. On a purely legal plane, this is what the Iran-Contra scandal was all about.

The Miscellaneous Receipts Statute (MRS), 31 U.S.C. § 3302(b), is one of the statutory safeguards protecting this basic congressional authority. It requires that any federal agent receiving money for the government promptly deposit it in the Treasury "without deduction for any charge or claim." The MRS was enacted in 1849 to prevent government employees, agents, and so forth from helping themselves to the proceeds of their activities, (possibly reducing interest, for a time at least, in positions as federal customs inspectors). What it means in practice is that even though the money received in some fashion is to compensate a particular account, it nevertheless must be returned to the general treasury. We can win a case from a base housing maintenance contractor yet not recover a dime for the base, nor even for the Air Force! It's hard to generate much commander enthusiasm about such Pyrrhic triumphs.

It doesn't have to be that way. There are a number of important exceptions to the general rule which, properly understood and used, can be used to put the purse back in the hands of the victim.

Payment Other Than Money

There are ways to make an injured party whole without actually paying money. For example, if a contractor's 10-ton cement mixer inadvertently dumps an odd ton or so on the wing commander's staff car, any payment of money in settlement of a claim would have to go to the general treasury. This sort of thing is particularly annoying to wing commanders. Not only must they pay for the repairs out-of-hide, they are

forced to drive a humiliatingly tacky second-string staff car in the interim. But, the offending contractor could agree to arrange for the repair of the vehicle itself, an arrangement which, because it does not involve the government's actual receipt of money, does not implicate the MRS. Commanders are much happier with this state of affairs, although they're still stuck with the tacky second-stringer for a while.

Refunds

There is generally no prohibition against getting a refund of money "for payments made in error, overpayments, or adjustments for previous amounts disbursed, including returns of authorized advances." Treasury Department-GAO Joint Regulation No. 1, Section 2, *reprinted* in 30 Comp. Gen. 595 (1950). A refund coming from a vendor or contractor may be credited to the appropriation that funded the original payment. *To the Secretary of War*, B-40355, 23 Comp. Gen. 648 (1944).

Setoff and Recoupment

This is related to the concept of a refund. Recall that the Miscellaneous Receipts Statute refers to *money*. It was not intended to abridge the government's common law rights under contract. Setoff and recoupment are mechanisms to adjust debts and liabilities where there is an ongoing contractual relationship between the parties. Recoupment would mean that recovery is made by means of the same contract from which the original fraud took place. In our hypothetical of the concrete car caper, if the contract were still ongoing, we could recoup the value of the loss by reducing the payments to the contractor on that contract. Setoff is a close relative to recoupment. It contemplates recoupment where the offending contractor or vendor has *another* contract with the government which can be used to satisfy the defrauded sum. Either way, the right appropriation is reimbursed.

Contract Adjustments or Credit

Where a contractor has overstated an amount to which it is entitled, and it is discovered in time, the contractor can submit invoices in the correct amount. Alternatively, if an overpayment has already been made, the contractor may simply provide goods or services in kind that would be chargeable to the same appropriation and fiscal year as the one defrauded. These two mechanisms are obviously direct and speedy, but may be of limited practical value where contract fraud investigations go unresolved until it is too late to use them. There is a second limitation on these recoveries. Different colors of money expire at different times. For example, operations and maintenance (O&M) money—the money usually at stake in base-level contractor fraud-- has only a one-year life. Aircraft procurement money expires after three fiscal years. Once an account expires, it continues to be available for a certain time for adjustments, including refunds. 23 Comp. Gen. 648 (1944); 6 Comp. Gen. 337 (1926); B-138942-O.M., August 26, 1976. However, recent legislation declares an appropriation canceled 5 years after it expires. 31 USC §§ 1551-58. Any recovery of funds defrauded from a canceled account must be deposited to the general treasury.

Replacement Contracts

The GAO recognizes an exception to the MRS which permits an agency to "retain recovered excess reprocurement costs to fund replacement contracts." Typically this would arise where the money is reimbursement for defective products or workmanship or the government in some fashion terminates the contract for default. *Bureau of Prisons—Dispositions of Funds Paid in Settlement of Breach of Contract Action*, B-210160, Sept 28, 1983, 62 Comp. Gen. 678, 683, 84-1 CPD Para 91. An agency may also retain amounts recovered as "additional costs" to reimburse the victimized appropriation. *Army Corps of Engineers—Disposition of Funds Paid in Settlement of Breach of Contract Actions*, B-210160, Sept 28, 1983, 62 Comp. Gen. 678.

False Claims Act

The False Claims Act, 31 U.S.C. § 3729, may be the fiscal Northwest Passage. It offers an invaluable way to return money taken as a result of contract fraud to the actual appropriation suffering loss. Because many, if not most, contractor fraud investigations can be cast in terms of a false claim, it bears a more detailed examination, below.

Basically, whoever: (a) presents a false or fraudulent claim for payment or approval; or (b) knowingly uses a false record of statement in support of a false or fraudulent claim ; or (c) conspires to defraud the government through a false claim; or (d) uses a false receipt to defraud the government; or (e) knowingly buys government property from an officer or employee of the Government, or a member of the Armed Forces, who may not lawfully sell that property; or (f) knowingly uses a false record or statement to conceal, avoid, or decrease an obligation to pay money or property to the government; is liable for a civil penalty of between $5,000 and $10,000 plus payment of treble damages and costs of bringing the action.

A claim is broadly defined to include "any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded." This seemingly covers most means by which contractor fraud is carried out.

The act itself doesn't tell us where a FCA recovery should go. Ordinarily we would expect that any such recovery would be returned to the general treasury in accordance with the MRS. However, in *Federal Emergency Management Agency—Disposition of Monetary Award Under False Claims Act*, B-23025, 69 Comp. Gen. 260 (1990), the GAO held that agencies may retain that portion of a monetary recovery received pursuant to a FCA judgment or settlement as "reimbursement for false claims, interest, and administrative expenses." What this means in everyday language is that we can recover our actual damages and put the money back into the immediate victim's hands! We can't, however, "show a profit." If there is a recovery in excess of our actual damages (such as treble damages) the remainder goes to the general treasury.

Although FCA actions can be brought by a private citizen (*qui tam* actions), in most of the cases relevant to us they are brought by the Department of Justice as civil actions. Strategically speaking, bringing an action under the FCA, even where other approaches are available, has considerable appeal both from DoJ's and DoD's perspective. For one thing, an FCA recovery is a measurable success—a dollars and cents trophy. For another, punitive damages and the recovery of costs is an appealing incentive to proceeding with actions to their conclusion. A third is that the possibility of paying treble damages is a powerful incentive to contractors to settle, and settle early. Under the *FEMA* decision, even settlement pursuant to the FCA permits the agency to recover its actual damages. Unlike certain other methods of recovery, such as recoupment, setoff, or in-kind reimbursement, where our interests and DoJ's may diverge, an FCA recovery is a win-win.

There has been some talk of pushing Congress to consider something like a Contract Fraud Recovery Act. As in any legislative initiative, the process can be long, laborious, and the outcome doubtful. Congress, ever watchful of its constitutional authorities, is apt to view any proposal for yet another statutory exception to the Miscellaneous Receipts Statute with some suspicion. We should not be dismayed if it doesn't happen. Besides, it would add little, if anything, to the authority already in our hands under the FCA and the 1990 Comptroller General decision, and may well prove altogether unnecessary .

The moral of the story for investigator and judge advocate alike is to be acquainted with the various avenues enabling recovery back to the victimized accounts. Empowered with knowledge of these avenues, we can shape our investigations, terminology, and our dealings with the DoJ, and the contractor so as to facilitate a just result. References in our reports to "false claims" or other language drawn from the False Claims Act itself, together with tailoring our investigative objectives to satisfying the elements of proof in

an FCA action, greatly strengthen our hand in arguing for the return of any recovered funds back to the Air Force. It's time the Air Force got its share of victim's rights.

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